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Supreme Court, U.S.
FILED
APR 11 2000
CLERK

No. 99-1464

IN THE

Supreme Court of the United States

E.I. DUPONT DE NEMOURS AND COMPANY
and GOODSILL ANDERSON QUINN & STIFEL,

Petitioners,

v.

SHARON MURAKAMI and HARVEY TOMONO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

There is no parent or publicly held company owning 10% or more of the corporate Petitioner DuPont's stock.

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These "Wrongful Removal Cases" present the issue of whether a lawsuit seeking to enjoin a removal to federal court and to recover damages for an allegedly wrongful removal raises federal questions. Respondents' "Brief in Opposition to Petition for Writ of Certiorari" ("Op. Br.") is premised on the same conflicts with established Supreme Court authority that underlie the Ninth Circuit's erroneous determination that no federal questions are at issue. By accepting Respondents' arguments, the Ninth Circuit has ceded state courts substantial control over the door to the federal courthouse, in direct contradiction of established Supreme Court authority and Congressional intent.

A. These Wrongful Removal Cases Are Exclusively Governed By Federal Law and Are Within the Exclusive Jurisdiction of Federal Courts, Because They Challenge the Propriety of a Removal to Federal Court and Seek to Control Federal Removal

The central issues in these Wrongful Removal Cases are whether DuPont "rightfully asked" for the removal of a separate case (called the "Fraudulent Inducement Case" in DuPont's Petition) to federal court and whether the Hawaii state courts have the power to punish any improper removal. This Court long ago ruled that these issues not only present a federal question but are issues controlled exclusively by federal law, to be decided exclusively by federal courts: "[W]hen an issue of whether a prayer for removal was rightfully asked arises, a Federal question results which is determinable by the courts of the United States free from limitation or interference arising from an exertion of state power." *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318, 329 (1914). *Harrison* further explained that "states are, in the nature of things, without authority to penalize or punish one who has sought to avail himself of the Federal right of removal on the ground that the removal asked was unauthorized or illegal." *Id. Donovan v. City of Dallas*, 377

U.S. 408, 413 (1964), makes it clear that "state courts are completely without power to restrain federal-court proceedings," including by a prohibition "addressed to the parties rather than to the federal court itself."

Nevertheless, Respondents assert, and the Ninth Circuit has agreed, that DuPont and its attorneys "may be subject under state law to the contempt authority of the state court" if the state court finds the removal of the Fraudulent Inducement Case to be wrongful. (Op. Br. at 8) According to Respondents and the Court of Appeals, the "forum selection clauses" contained in dismissals of prior cases limit DuPont's right to remove a subsequent case to federal court and are a predicate for state-court damages and contempt sanctions. *See, id.* at 10 ("The Ninth Circuit correctly found that Goodsill could be subject to the authority of the state court for violation of a court order."); *id.* at 12 ("forum selection clause" in dismissals "can be enforced by the state court's civil contempt authority"). Respondents' contentions and the Ninth Circuit's opinion cannot be reconciled with *Harrison*.

No state law cause of action is permitted for wrongful removal to federal court. The subject is entirely covered by federal removal statutes, which include remedies for wrongful removal in 28 U.S.C. § 1447(c), and is exclusively for federal courts to decide. Any Hawaii state law prohibiting removal or subjecting a party exercising such a right to injunctions and sanctions is controlled by federal law, because *Harrison* provides that any claim for wrongful removal presents a "Federal question" determinable by the federal courts, and that states cannot "penalize or punish one who has sought to avail himself of the Federal right of removal." 232 U.S. at 329. Thus, even if "the authority of the state court, which derives from state statutes and constitutions" were "violated" by removal (Op. Br. at 4), federal law would control whether or not a removal could be

punished and what remedies were appropriate; and that law must be applied by federal courts.

Respondents miss a step when they argue that the Supreme Court's authorities on this issue are distinguishable as not involving a voluntary waiver. (Op. Br. at 2-3) This Court's cases focus on the questions of *who decides*, and *under what law*, whether there is a right to remove and the consequences of a removal in the face of an asserted waiver. The need for federal control, to safeguard and standardize the federal right to removal, is as strong whether the effort to avoid or penalize removal is based on an alleged waiver, on a claim of vexatious litigation or on the interpretation of a statute or of what constitutes a "case."

Any doctrine that allows state courts to decide the propriety of removal to federal court would risk inconsistent results and would interfere with federal control over removal. Removals that federal courts ultimately find to be proper, not sanctionable or sanctionable in a specified manner should not be subject to state re-determinations as to whether the removal was wrongful and as to the appropriate sanctions for such wrongful removal.

B. Even Were a State Wrongful-Removal Cause of Action Permitted, Federal Courts Would Have Federal Question Jurisdiction Over the Case, Because the Right to Relief in Any Such Case Would Necessarily Depend on Resolution of Substantial Questions of Federal Law

It is immaterial that Respondents purport to base their claims on state law causes of action. *See* Op. Br. at 9 ("Hawaiian state statutes were the basis of the claims asserted."). Even were it assumed that such a state cause of action existed and was permissible under federal law (contrary to the holding of *Harrison*), any state law claim for wrongful removal to federal court would necessarily be

based and dependent on the resolution of the federal law questions of (i) whether the removal was wrongful; (ii) whether relief for wrongful removal could be sought in a separate lawsuit or must be sought in the removed case under 28 U.S.C. § 1447(c) and Federal Rule of Civil Procedure 11; and (iii) what relief, if any, would be appropriate. Therefore, regardless of the "basis" for the claims, Respondents' "right to relief necessarily depends on resolution of a substantial question of federal law," which according to *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983), results in federal question jurisdiction.

A claim may involve an "essential element" of federal law even though state law creates the cause of action. *Id.*; *see also City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997). Federal question jurisdiction does not depend on whether Petitioners were "subject to a viable claim under state law" (Op. Br. at 9) but on whether the claims necessarily depend upon the resolution of substantial questions of federal law. The issues of the propriety of the removal and of the relief for any allegedly wrongful removal constitute federal questions.

The fact that a "forum selection clause" is involved does not eliminate the federal questions presented by Respondents' "wrongful removal" claims. Federal question jurisdiction arises from the fact that the conduct allegedly giving rise to these Wrongful Removal Cases is Petitioners' removal to federal court. The fact that a forum selection clause is the asserted reason why the removal is wrongful cannot nullify that jurisdiction.

The forum selection clause is not "entangled" with the question of jurisdiction (Op. Br. at 11): Federal question jurisdiction arises from the claim that a removal to federal court was wrongful and should be sanctioned; the alleged reasons and bases for such claims cannot erase the exercise

of the federal right to remove that is involved. Jurisdiction is not affected by the fact that, in order to resolve the merits, the court has to evaluate, among other things, claims that the removal was wrongful as a result of a forum selection clause.

To any extent Respondents argue that the forum selection clause precluded federal jurisdiction over the Wrongful Removal Cases themselves, this contention is belied by the very authority Respondents cite. Only if the court has jurisdiction does the court determine whether the party invoking federal jurisdiction has "waived" the right to proceed in federal court (for example by executing a mandatory forum selection clause) — a non-jurisdictional determination. As Respondents correctly note, citing *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 278 (9th Cir. 1984), the "existence of subject matter jurisdiction is a condition precedent to [a] district court's ability to construe or enforce a forum selection clause." (Op. Br. at 10)[1]

Respondents cite a number of cases for the uncontested proposition that the right to remove a case to federal court may be waived. (Op. Br. at 7, 10) But the question is not whether DuPont's right to remove could have been or was waived, but whether state or federal law governs whether removal rights have been waived. If federal law governs, then this issue constitutes another reason why federal law is an "essential element" of any claim for wrongful removal based upon such a clause. *City of Chicago*, 522 U.S. at 163-64; *Franchise Tax Bd.*, 463 U.S. at 27-28; *Gully v. First Nat'l Bank of Meridian*, 299 U.S. 109, 112 (1936).

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1. The federal district court appropriately recognized and applied these principles in the Fraudulent Inducement Case. (App. 30-44.) After ruling that diversity jurisdiction had not been established, the Court noted that it "cannot address Plaintiffs' remaining argument that the parties are required to litigate this action in state court pursuant to a stipulation of dismissal signed between Plaintiffs and DuPont." (App. 44 n.7, citing *Pelleport.*)

As shown in Section 2 of the Petition, virtually every Court of Appeals that has addressed the issue has held that federal law governs. The cases Respondents cite are all federal cases applying federal law to the waiver issue.[2] It is telling that, although Respondents and the Ninth Circuit say that state law controls the determination of whether the right of removal has been waived, both cite only *federal* cases on this waiver issue.

Construction of an alleged waiver clause is but one aspect of the federal questions posed by a claim that a removal to federal court was wrongful and that the removal should be enjoined, sanctioned and a basis for damages. Even if construction of the clause were a state law issue, it would not eliminate the federal questions presented by a wrongful removal case, because the particular reason for arguing that a removal was "wrongful" is not relevant to *Harrison*'s unambiguous holding that any claims of improper removal raise a "Federal question." *Harrison*'s point is that, whatever the reason for contending a removal to be wrongful, a *federal* court applying *federal* law must evaluate the wrongful removal claim. If this principle is encroached upon for any reason, state law evisceration of federal removal rights will ensue. The Ninth Circuit's opinion is such an encroachment and calls for correction.

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2. In *Archdiocese of Milwaukee v. Underwriters at Lloyd's, London*, 955 F. Supp. 1066 (E.D. Wis. 1997), the district court considered but rejected state "forum non conveniens" cases cited by the insurer, adopting a magistrate's decision that applied federal law to the interpretation and enforcement of the clause. In *Wats/800, Inc. v. Voice America*, 867 F. Supp. 811 (S.D. Ind. 1993), the district court, without considering the state/federal law issue, cited state contract cases for general contract interpretation principles, but then analyzed federal cases in addressing the waiver issue.

C. This Court Should Not be Misled or Sidetracked by Respondents' "Fraudulent Joinder" Arguments or by Respondents' Mischaracterization of These Cases

DuPont's Petition and Question Presented are based solely on the Ninth Circuit's determination that the district court lacked *federal question* jurisdiction over the Wrongful Removal Cases. Respondents' opposition attempts to obscure the federal questions by repeatedly defending the Ninth Circuit's entirely separate determination of the "fraudulent joinder" issue, which is pertinent only to diversity jurisdiction. Indeed, in their Conclusion, Respondents do not mention federal question jurisdiction at all but attempt to finesse it by stating, "Goodsill was not fraudulently joined, and no jurisdiction existed for any further orders by the District Court." (Op. Br. at 12-13.)

DuPont petitioned for certiorari only on the basis of the federal questions raised by these Wrongful Removal Cases. The "fraudulent joinder" issue is Respondents' "strawman," an easy issue to argue because DuPont does not argue the issue at all. The Ninth Circuit's rulings on fraudulent joinder and diversity jurisdiction are irrelevant to this Petition.

Respondents contend that the Wrongful Removal Cases (also called the Special Proceedings) were not "some form of civil action" but were "simply motions to enforce compliance with a voluntarily entered stipulation of venue." (Op. Br. at 2.) However, the Wrongful Removal Cases were and had to be entirely separate actions, because they were commenced in state court during the pendency of the removal of the Fraudulent Inducement Case to federal court. The state court was at that time precluded from taking any action in the Fraudulent Inducement Case by 28 U.S.C. § 1446(d)'s mandate that "the State court shall proceed no further unless and until the case is remanded."

An obvious reason for Section 1446(d) is to prevent state courts from usurping or interfering with a removed case unless and until the federal court decides that it should be remanded. Respondents' "Special Proceedings" were a blatant attempt to evade Section 1446(d). The Ninth Circuit's opinion authorizes parties to do indirectly what Congress has stated cannot be done directly, an error this Court should correct.

D. Review and Correction by this Court is Needed Because The Ninth Circuit's Opinion Authorizes State Court Interference with Federal Court Proceedings and With Access to Federal Courts

Unless corrected by this Court, the Ninth Circuit's opinion will be utilized to allow state courts to interfere with the federal removal process and with a person's right of access to federal courts. If a state court litigant allegedly aggrieved by a "wrongful removal" of a case to federal court could obtain damages, injunctions and contempt from a state court, the rights and protections afforded by the removal, diversity and federal question jurisdiction statutes would be rendered impotent, and the national interest in uniform application of the removal statutes would be replaced by a scheme in which the removability of a case turned upon the law of the state in which a wrongful removal case was brought.

The Ninth Circuit says that "the proposition that a state court may not enjoin a litigant from proceeding in federal court," stated in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), is "inapposite" in a case involving a contractual forum selection clause. (App. 8-9.) The ramifications of such a distinction are obvious and enormous.

Even now, Respondents are citing the Ninth Circuit's opinion as authority for a Hawaii state court to enjoin two now-pending federal actions originally commenced by

DuPont in federal court and indisputably satisfying the requirements of diversity jurisdiction. (Op. Br. at 3.) Respondents contend that the Ninth Circuit opinion authorizes a state court to enjoin pending federal cases even if the federal court has considered and rejected the same contention that a "forum selection clause" bars a federal suit. (App. at 21-24.) If allowed to stand, the Ninth Circuit's opinion will erode and confuse the carefully-enunciated, unequivocal principle embodied in this Court's decisions: federal courts, without interference or penalty from state courts, are exclusively empowered to decide whether litigation will and should proceed under the federal removal statutes.

A federal court may be required to remand or dismiss a case, or to decide it in a certain way, because the federal court determines that it lacks jurisdiction or because of state law applicable to the federal case under federal principles, including *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). But *federal* courts always decide whether to accept or turn away a case filed within their doors. State courts cannot interfere — directly or through coercion of the parties — with the federal court's exclusive power to determine its own jurisdiction. *Donovan v. City of Dallas*, 377 U.S. 408, 412-414 (1964) ("state courts are completely without power to restrain federal-court proceedings in *in personam* proceedings"); *General Atomic Co. v. Felter*, 434 U.S. 12, 15-17 (1977) (state courts cannot enjoin "pending or prospective" federal litigation; any other result would be "untenable and . . . in direct conflict with the Supremacy Clause of the Constitution"). *See generally United States v. United Mine Workers of America*, 330 U.S. 258, 290-92 & n.57 (1947) ("court has jurisdiction to determine its own jurisdiction"); *United States v. Shipp*, 203 U.S. 563, 572 (1906) (federal court and federal court alone could decide if it had no jurisdiction; "It and it alone necessarily

had jurisdiction to decide whether the case was properly before it").

The Ninth Circuit's opinion is completely inconsistent with this Court's uniform rejection of state attempts to burden or preclude resort to federal court. Authorizing state court suits to enjoin, sanction, impose damages on or imprison parties for what a state court found to be "wrongful" removal would fundamentally undermine federal removal jurisdiction and obscure the right "to seek removal unchecked and unburdened by state authority" that *Harrison* holds "freely exists." 232 U.S. at 329.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Petition for a Writ of Certiorari, the Petition for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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